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VIRGINIA LAW REGISTER

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Is the Public Willing to Be Protected against Itself?

In a great many instances the answer to this question might be Yes, but in one very important particular the public seems decidedly indisposed to protect itself. The illegal practice of medicine has been stopped. No man today dare prescribe the simplest medicine and make a charge for it without subjecting himself to pains and penalties, unless he has been regularly licensed as a physician and undergone the strictest kind of examination by a board appointed for that purpose. No man dare plug a tooth and make a charge for it unless he has been regularly licensed as a dentist, after passing the examination. No drug clerk dare fill the simplest prescription made by a doctor for a sick patient unless he is a regularly licensed pharmacist. That these are wise and beneficent laws no one can question and yet the public is not willing to protect itself against the illegal practice of law. For, what is practicing law? Is it simply bringing suits, appearing in court and trying legal documents? Is it not also to act as the adviser and counsellor of men needing advice and counsel upon the most important business transactions? And thus we have stated, no one not a regular physician can prescribe for a patient and receive pay; no one but a dentist can do likewise, and no person can make up a prescription and charge for it without license; yet any man throughout the country, no matter how ignorant and how unlearned, is allowed to draw a deed and a will and make a charge for it without rendering himself liable to the penalties which should be inflicted upon any man illegally practicing law. It is not often that medical advice given by a layman, even without charge, kills anybody, nor would it happen very often that an unskilled and unlicensed dentist would do much harm in

plugging a tooth, or that a drug clerk who is not a licensed pharmacist, filling a prescription would be apt to kill anybody; but the time might come when a slight slip in any one of these directions would do infinite harm. It is against this chance that the law attempts to protect people in the three instances mentioned. And yet how many lawyers who have practiced for any length of time have come across cases in which the drawing of a deed or will by unskilled hands has caused the loss of property and long and tedious litigation. There is not a county or city in this State, we suppose, where laymen do not draw deeds and wills and charge some trifling sum for it—and such deeds and such wills! We know of one instance of a man with a fair education and who has occupied somewhat of a prominent position in his immediate neighborhood, who makes a constant practice of drawing deeds and never draws any two alike. We have known several examinations of title in which deeds drawn by this man have necessitated chancery suits. The party paid a dollar for drawing the deed and fifty dollars and costs to have it corrected. The last instance which has come under our immediate purview was a deed drawn by this same gentleman in which the grantees, for themselves their "ars" and all other persons warranted specially the land which had been conveyed to them, and the deed concluded with the following remarkable clause: "The grantors and grantees in the aforesaid instrument hereby waive the homestead and all other obligations as to the benefits of this deed." We know of one instance in which a gentleman of some means in the county desired his will to be drawn. He consulted a firm of attorneys who told him that they could not draw the will for less than fifty dollars. He remarked that the deputy clerk of the court had offered to draw the will for a dollar. He was told that the deputy clerk would have to draw it if that was the case. The deputy clerk did draw it. When the will was probated the same lawyers who would have drawn it properly for fifty dollars charged two hundred and fifty for the chancery suit which was brought to construe it, and the case after some two or three years litigation went to the Court of Appeals with a probable cost of a thousand dollars to the estate. A fifty dollar fee paid to counsel to draw the will would have saved all this trouble.

The Richmond Bar Association has prepared the following bill, which has been introduced in the Legislature. That it should be passed no one with a proper idea of the duty of the State to the profession—a licensed and taxed one—can have any doubt. We wish we could be as sure of the passage of the bill as we are of this fact. The passage of this bill would not only be to the advantage of the profession, of course, but we believe it would be equally to the best interest of the citizens of the Commonwealth. New York, Massachusetts and Missouri have passed similar laws to correct an evil which is growing throughout this Commonwealth.

A BILL to define the "practice of law" and "law business" to prohibit the doing thereof by persons not licensed as attorneys, by associations or corporations and to provide penalties and remedies for the violation thereof.

1. Be it enacted by the General Assembly of Virginia that the "practice of law" is hereby defined to be and is the appearance of an advocate in a representative capacity or the drawing of any papers, pleadings or documents or the performance of any act, in such capacity, for compensation, in connection with proceedings pending or prospective before any court of record, commissioner, referee, or any body, board, bureau, department, committee, or commission constituted by law, or having authority to settle controversies. That "law business" is hereby defined to be and is the advising or counselling for compensation of any person, firm, association or corporation as to any secular law, the drawing of any deed as an independent transaction, for compensation for any person, firm, association, or corporation, the drawing of any will for which compensation is received or to be received, either directly or indirectly or in connection with any transaction from which any compensation is received or expected to be received by the person, firm, association or corporation drawing such will in any representative capacity whatsoever; and the naming of such person, firm, association or corporation, or any agent of them, as fiduciary shall be deemed compensation for the drawing of such will within the meaning of this act.

2. No person shall engage in the "practice of law" or "law business," as defined by this Act, either directly or indirectly, unless such person be a duly licensed and qualified attorney at law whose license as such is in full force and effect.

3. No person, firm, association, or corporation shall solicit

or advertise to engage in the "practice of law" or to do "law business" as herein defined; except that no duly qualified lawyer shall be prohibited from entering his name in legal directories or publishing in newspapers or periodicals an announcement of the fact that he is a member of the bar.

4. No person, firm, association or corporation not authorized by this Act to engage in the "practice of law" and "law business" as herein defined shall receive or accept any fees, charges, or credits on account of any fees or charges, either directly or indirectly, in whole or in part, arising from the "practice of the law" or "law business" by any attorney at law. Nor shall any duly licensed or qualified attorney at law, who is an officer, trustee, director, agent or employee of any person, firm, association or corporation or who is regularly employed or retained or otherwise compensated by such person, firm, association or corporation, act as attorney or do any "law business" as herein defined, for or on behalf of any person, firm, association or corporation dealing or transaction or about to deal or transact any business with such person, firm, association or corporation whose officer, trustee, director, agent, or employee such attorney is, or by whom such attorney is regularly retained or employed or otherwise compensated in any connection with such services, without fully advising and informing such person, firm, association or corporation of his relations with such other person, firm, association or corporation, and at all times maintaining full professional and direct responsibility to such person, firm, association or corporation to whom or in whose behalf his advice, counsel or professional service is given.

5. Any person, firm, association or corporation, or attorney at law, violating any of the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not exceeding Five Thousand Dollars.

6. This Act shall not apply to any association or corporation organized for benevolent or charitable purpose or for the purpose of assisting persons without means in the pursuit of any civil remedy provided no compensation is received or to be received, either directly or indirectly, by such association or corporation for such aid or assistance.

7. This Act shall not be so construed as to prevent persons, firms, or corporations doing business as real estate agents, agents for collecting rents, real estate auctioneers or private bankers from drawing all deeds, contracts and other papers usual and necessary in transactions originating in their business.

War Time Prohibition.

As might have been expected by those who have followed the decisions of the Supreme Court of the United States for a great many years, the War Time Prohibition Act has been sustained by a majority of the Supreme Court of the United States, the opinion of the Court being delivered by Mr. Justice Brandeis—Mr. Justice McReynolds, Mr. Justice Day, Mr. Justice Van Devanter and Mr. Justice Clarke dissenting. The case is that of *Ruppert* v. *Caffey*, reported in the February number of the advanced Opinions of the United States Supreme Court.

With all due respect to the Court it seems to us that it has followed the absolute madness which seems to have taken possession of what may be known as the "Prohibition part" of the American people. The Court says that the question does not turn upon whether the beer, which was the subject of controversy in this case, is intoxicating or not, "For the Legislatures and decisions of the highest courts of nearly all of the states establish that it is deemed impossible to effectively enforce either prohibitory laws or other laws merely regulating the manufacture and sale of intoxicating liquors if liability of inclusion within the law is made to depend upon the issuable fact whether or not a particular liquor made or sold as beverage is intoxicating. In other words it clearly appears that the liquor law to be capable of effective enforcement must in the opinion of the legislatures and courts of the several states be made to apply either to all liquors of the species enumerated, like beer, ale or wine, regardless of the presence or degree of alcoholic content; or if the more general description be used, such as distilled, rectified, spirituous, fermented, malt or brewed liquors, to all liquors, whatever their general description, regardless of alcoholic content, or to such of these liquors as contained a named percentage of alcohol."

In other words then, in order to enforce prohibition the Legislature could prohibit the manufacture or sale of tea or coffee, ginger ale, which is certainly called "ale," or persimmon beer, which is commonly known under that name.

The case in question turned upon the implied war powers of

Congress over intoxicating liquors, and the majority of the court holds that a law can be enacted which will not merely prohibit the sale of intoxicating liquors but will effectually prevent their sale. We have laws on the statute books prohibiting murder, prohibiting larceny, prohibiting other crimes—Could a law be passed abolishing property because it caused theft? Or abolishing very many of the acts which cause murder? Logically there is but one answer and that is, Yes. It is a curious fact that the laws and the decisions of the court to prevent the sale and use of intoxicating liquors seem to stand in a class entirely by themselves and subject neither to the laws of right, reason or human liberty. The dissenting opinion of Mr. Justice McReynolds is worthy of perusal—so much so that we have determined to print it in full in this editorial, and whilst we have little hope that the words of wisdom contained in this strong paper will have the slightest effect, yet we think it well to reproduce them in the hope that when our people awake to the subtle sapping and mining of their liberties which have been going on for so many years they may find these arguments ready for their use.

Mr. Justice McReynolds, with whom concurred Mr. Justice Day and Mr. Justice Van Devanter, dissenting:

"I cannot accept either the conclusion announced by the court or the reasons advanced to uphold it. The importance of the principles involved impels a dissent.

We are not now primarily concerned with the wisdom or validity of general legislation concerning liquors, nor with the intoxicating qualities of beer, nor with measures taken by a state under its inherent and wide general powers to provide for public safety and welfare. Our problem concerns the power of Congress and rights of the citizen after a declaration of war, but not when active hostilities have ended and demobilization has been completed.

The government freely admits, since the present cause stands upon motion to dismiss a bill which plainly alleges that the beer in question is nonintoxicating, we must accept that allegation as true and beyond controversy. In United States *v.* Standard Brewery, decided this day[— U. S. —, post, 174, 40 Sup. Ct.

Rep. —], we rule in effect that for many months prior to the Volstead Act, passed October 28, 1919, no law of the United States forbade the production or sale of nonintoxicating malt liquors. And so the question for decision here distinctly presented is this: Did Congress have power on October 28, 1919, directly and instantly to prohibit the sale of a nonintoxicating beverage, theretofore lawfully produced and which until then could have been lawfully vended, without making any provision for compensation to the owner?

The Federal government has only those powers granted by the Constitution. The 18th Amendment not having become effective, it has no general power to prohibit the manufacture or sale of liquors. But by positive grant Congress has been empowered: "To declare war," "to raise and support armies," "to provide and maintain a navy," "to make rules for the government and regulation of the land and naval forces," "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers;" and to these it is attempted to trace the asserted power to prohibit sale of complainant's beer. See, concerning implied powers, Cooley, Const. Law, 105; Story, Const. 4th ed. § 1243.

The argument runs: This court has held in Hamilton *v.* Kentucky Distilleries & Warehouse Co. (decided December 8th) that under a power implied because necessary and proper to carry into execution the above named powers relating to war, in October, 1919, Congress could prohibit the sale of intoxicating liquors. In order to make such a prohibition effective the sale of nonintoxicating beer must be forbidden. Wherefore, from the implied power to prohibit intoxicants the further power to prohibit this nonintoxitant must be implied.

The query at once arises: If all this be true, why may not the second implied power engender a third, under which Congress may forbid the planting of barley or hops, the manufacture of bottles or kegs, etc., etc.? The mischievous consequences of such reasoning were long ago pointed out in Kidd *v.* Pearson, 128 U. S. 1, 21, 32 L. Ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6, where, replying to a suggestion

that under the expressly granted power to regulate commerce, Congress might control related matters, it was said:

> "The result would be that Congress would be invested, to the exclusion of the states, with the power to regulate not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining,—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly an interstate or foreign market?"

For sixty years Ex parte Milligan, 4 Wall. 2, 120, 125, 18 L. Ed. 281, 295, 297, has been regarded as a splendid exemplification of the protection which this court must extend in time of war to rights guaranteed by the Constitution, and also as decisive of its power to ascertain whether actual military necessity justifies interference with such rights. The doctrines then clearly—I may add, courageously—announced conflict with the novel and hurtful theory now promulgated. A few pertinent quotations from the opinion will accentuate the gravity of the present ruling:

> "Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words that it would seem the ingenuity of man could not evade them, are *now*, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has

been happily proved by the result of the great effort to throw off its just authority.

"This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which *time* had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of habeas corpus."

By considering the circumstances existing when the War-time Prohibition Act of November 21, 1918 [40 Stat. at L. 1045, chap. 212], was challenged, in order to reach the conclusion announced in Hamilton *v.* Kentucky Distilleries & Warehouse Co. supra, this court asserted its right to determine the relationship between such an enactment and the conduct of war; the decision there really turned upon an appreciation of the facts. And that the implied power to enact such a prohibitive statute does not spring from a mere technical state the war, but depends upon some existing necessity directly related to actual warfare, was recognized. Treating that opinion as though it asserted the existence of a general power delegated to Congress to prohibit intoxicants, certain cases which declare our inability to interfere with a state in the exercise of its police power (Purity Extract & Tonic Co. *v.* Lynch, 226 U. S. 192, 57 L. Ed. 184, 33 Sup. Ct. Rep. 44; New York ex rel. Silz *v.* Hesterberg, 211 U. S. 31, etc., 53 L. Ed. 75, 29 Sup. Ct. Rep. 10) are now

cited, and it is said they afford authority for upholding the challenged statute. But those cases are essentially different from the present one, both as to facts and applicable principles; the power exercised by the states was inherent, ever present, limited only by the 14th Amendment, and there was no arbitrary application of it; the power of Congress recognized in Hamilton *v.* Kentucky Distilleries & Warehouse Co., and here relied upon, must be inferred from others expressly granted, and should be restricted, as it always has been heretofore, to actual necessities consequent upon war. It can only support a measure directly relating to such necessities, and only so long as the relationship continues. Whether these essentials existed when a measure was enacted or challenged, presents a question for the courts; and, accordingly, we must come to this ultimate inquiry:—Can it be truthfully said, in view of the well-known facts existing on October 28, 1919, that general prohibition immediately after that day of the sale of nonintoxicating beer theretofore lawfully manufactured could afford any direct and appreciable aid in respect of the war declared against Germany and Austria?

What were the outstanding circumstances? During the nineteen months—April, 1917, to November, 1918—when active hostilities were being carried on, and for almost a year thereafter, Congress found no exigency requiring it to prohibit sales of nonintoxicating beers. The armistice was signed and actual hostilities terminated November 11, 1918. Our military and naval forces, with very few exceptions, had returned and demobilization had been completed. The production of war material and supplies had ceased long before and huge quantities of those on hand had been sold. The President had solemnly declared: "The war thus comes to an end; for having accepted these terms of armistice, it will be impossible for the German command to renew it." Also—"That the object of the war is attained." "The quiet of peace and tranquillity of settled hopes has descended upon us." July 10, 1919, he announced: "The war ended in November, eight months ago;" and in a message dated October 27, 1919, he declared that war emergencies which might have called for prohibition "have been sat-

isfied in the demobilization of the Army and Navy." Food supplies were abundant, and there is no pretense that the enactment under consideration was intended to preserve them. Finally, the statute itself contains no declaration that prohibition of nonintoxicants was regarded as in any way essential to the proper conduct or conclusion of the war or to restoration of peace.

Giving consideration to this state of affairs I can see no reasonable relationship between the war declared in 1917, or the demobilization following (both of which in essence if not by formal announcement terminated before October, 1919), or restoration of peace (whose quiet had already discended upon us), and destruction of the value of complainant's beverage, solemnly admitted in this record to be nonintoxicating, and which it manufactured, held, and desired to sell in strict compliance with the laws of New York. Nor can I discover any substantial ground for holding that such destruction could probably aid in an appreciable way the enforcement of any prohibition law then within the competency of Congress to enact. It is not enough merely to assert such a probability; it must arise from the facts.

Moreover, well-settled rights of the individual in harmless property and powers carefully reserved to the states ought not to be abridged or destroyed by mere argumentation based upon supposed analogies. The Constitution should be interpreted in view of the spirit which pervades it, and always with a steadfast purpose to give complete effect to every part according to the true intendment,—none should suffer emasculation by any strained or unnatural construction. And these solemn words we may neither forget nor ignore: "Nor shall any person . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." [5th Amend.] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." [10th Amend.]

The Prohibition Amendment.

The Supreme Court has held in the case of *Duhne* v. *State of New Jersey* that the judicial power granted by the Constitution of the United States does not embrace the authority to entertain a suit brought by a citizen against his own state without its consent. This was a case in which a private individual asked leave to file an original bill against the Attorney General of the United States, the Commissioner of Internal Revenue thereof, and the United States District Attorney for the District of New Jersey, as well as against the State of New Jersey, for an injunction restraining the officials named and the State of New Jersey, its officers and agents from in any manner directly or indirectly enforcing the 18th Amendment to the Constitution of the United States, on the ground that the amendment was void from the beginning and formed no part of the Constitution. The Court, we think very properly held that the judicial power granted by the constitution of the United States did not embrace the authority to entertain a suit brought by a citizen against his own state without its consent. But the question of the amendment is to come up in another shape. The State of Rhode Island is contesting the validity of the amendment and the Enforcement Act in the Supreme Court of the United States, and the case promises to give rise to one of the most interesting and famous discussions and decisions in our constitutional history. The State of Rhode Island has requested permission to file an original bill in equity against Attorney General Palmer and Commissioner of Internal Revenue Roper.

The brief asserted that Rhode Island, "In the exercise of its inherent and exclusive right to manage and control its internal affairs as a separate community and independent State," to provide revenue and encourage industry, had allowed manufactories of intoxicating liquors to be established and had received, by itself and its municipal sub-divisions, money for licenses to sell liquors. The Eighteenth Amendment would impair the value of the manufactories and destroy the revenue, to "the great and irreparable injury of the State."

The enforcement of the Eighteenth Amendment will deprive

the people of the state of Rhode Island of that liberty of self-government in the mangement and control of their domestic affairs as a community which it was the very purpose of the Constitution of the United States to secure for them, and will also deprive them in their sovereign capacity of that power of police and economy in the regulation of the civil institutions of said State, adapted for the internal government thereof, which the people of said State have possessed, exercised, and enjoyed for nearly three centuries, a power never delegated to the United States, but expressly reserved to the people of Rhode Island by the people of the United States.

Besides this unconstitutional infringement on the police power of the State, the amendment violates the Fifth Amendment of the Constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." In short, the Eighteenth Amendment is "usurpatory, unconstitutional, and void."

We do not claim to be prophets or sons of prophets, but if we were a betting man we would give almost any odds in favor of a decision from the Supreme Court, probably by five to four, upholding the Eighteenth Amendment and all acts passed to enforce it.

Criminal Law: Former Jeopardy: Reversal of First Conviction.

The decision of the Supreme Court of the United States in the recent case of *Stroud* v. *U. S.* is of interest to us in Virginia in connection with the statute allowing a jury in case of a conviction of murder in the first degree to fix the punishment at imprisonment for life instead of electrocution. The question has been raised as to what would be the result in a case where a jury found a prisoner guilty of murder in the first degree and fixed the punishment at confinement in the penitentiary for life, and on the motion of the prisoner the verdict was set aside and a new trial granted, and upon that new trial the prisoner was again convicted of murder in the first degree and the

punishment fixed at death. Could the last verdict stand? The Supreme Court has answered "yes."

One Stroud was indicted for killing one Turner. He was convicted of murder in the first degree and sentenced to be hung. On an appeal the Government confessed error. He was re-tried, again found guilty of murder in the first degree and a life sentence given him under the law of the U. S. (35 Stat. at L. 1152) Section 330 of the Criminal Code. He again appealed. The Government again confessed error and the verdict was set aside. On the third trial he was again convicted and found guilty of murder in the first degree without recommendation, which meant a death sentence, and he was accordingly sentenced to be hung. Upon his third appeal he claimed that the last trial had the effect to put him twice in jeopardy for the same offense, in violation of the 5th Amendment to the Constitution, but this contention the Supreme Court of the United States declined to sustain, holding that as he had sued out the writs of error in the two previous trials and obtained reversals, all that the appellate court could do after such reversal was to award a new trial on finding error in the proceedings, the action of the court which resulted in a further trial being the result of the plaintiff's own proceeding. Stroud was accordingly hanged, as he should have been, the murder he committed having been a very brutal one.

This case can very well be considered under Section 4918 of our present Code, which is similar to Section 4040 of the Code of 1887, which provides that if a verdict be set aside and new trial granted the accused he shall not be tried for any higher offense than that for which he was convicted on the last trial. We hardly think it capable of doubt that no matter what *punishment* was fixed at the first trial, this could not affect the *punishment* on any future trial, if the offense is that of murder in the first degree. The verdict of the jury would simply relate to the degree of punishment for that crime, and therefore, though the first verdict was for life imprisonment and the second for death the prisoner would not have been tried at the second trial for any higher offense than that of which he had been previously convicted.